TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904~~ 1905.

No. ~~954~~ 85.

THE RUSSIAN AMERICAN PACKING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 22, 1904.

(19,451.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 351.

THE RUSSIAN AMERICAN PACKING COMPANY, APPELLANT,

vs.

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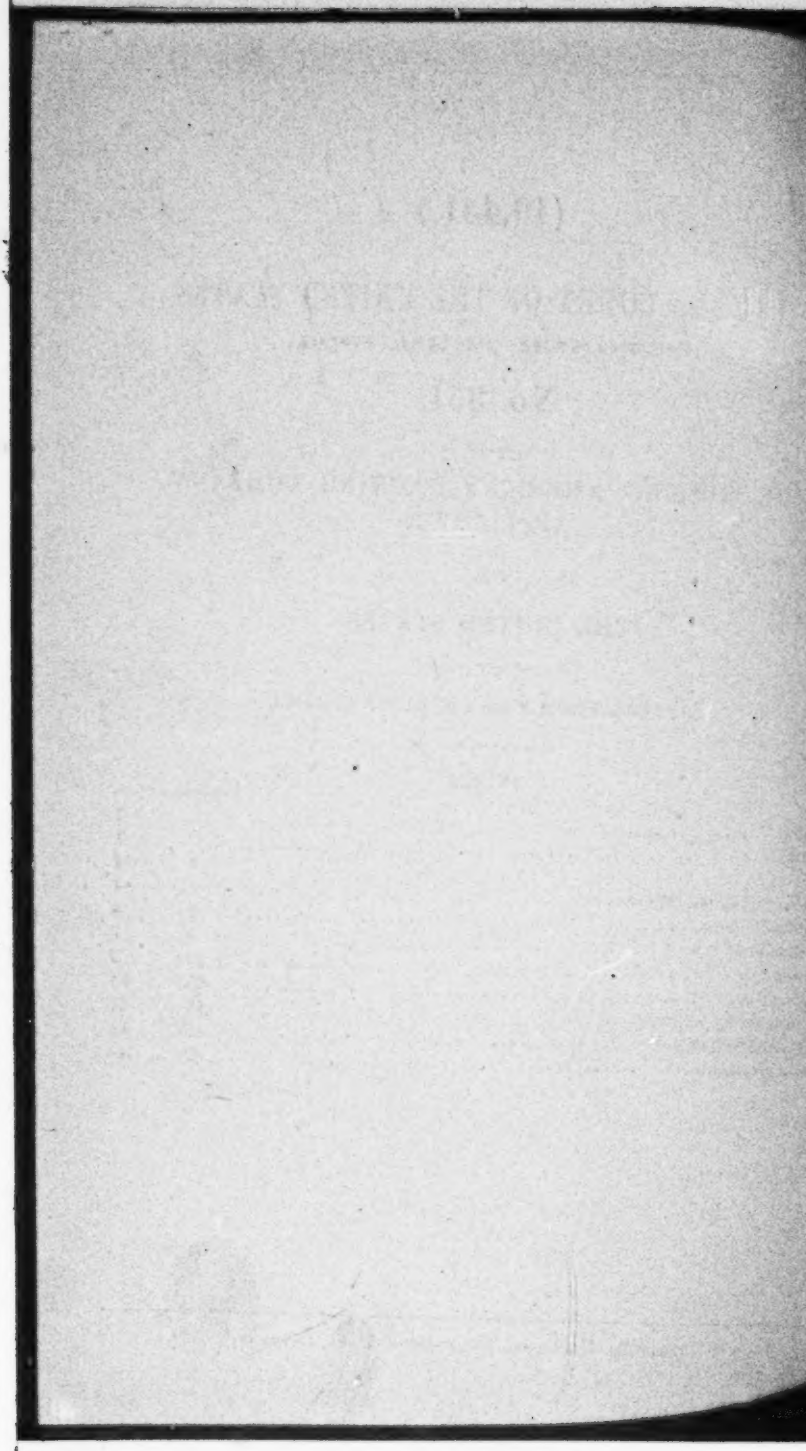

1 Court of Claims.

THE RUSSIAN-AMERICAN PACKING COMPANY (a Corporation)
vs.
THE UNITED STATES. } No. 20758.

I.—*Petition. Filed April* 14, 1897.

To the honorable the judges of the Court of Claims:

The petition of the Russian American Packing Company respectfully represents:

1. That The Russian American Packing Company, the claimant herein, is a corporation duly incorporated under and by virtue of the laws of the State of California, and that as such corporation your petitioner was privileged to acquire and hold lands and operate various franchises in the State of California and in the Territories of Washington and Alaska in the United States.

2. That after the incorporation of this company, to wit, in April, 1889, your petitioner entered upon a certain tract of land in Alaska, the same being on Afognak island on the north shore of Afognak bay, containing a certain number of acres, to wit, one hundred and fifty-nine and fifty-two one hundredths (159.52) acres and began immediately to make improvements thereon.

3. That at the date of the passage of the act of Congress, entitled "An act to repeal the timber culture laws, and for other pur-
2 poses," approved March 3, 1891 (26 Statute at Large, 1100), which provided, among other things, that—

"Any citizen of the United States twenty-one years of age now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land, at two dollars and fifty cents per acre: Provided, that in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act,"

your petitioner was still, and had been continuously from the month of April, in the year 1889, in possession of and occupying said tract of land for the purpose of trade and manufactures, and had made improvements thereon of the value of thirty-one thousand ($31,000) dollars. That on the first day of April, 1892, pursuant to

and in accordance with the provisions of said act and the regulations adopted by the Secretary of the Interior, your petitioner made application, under oath, to the United States marshal and *ex-officio* surveyor general of Alaska, for estimates of the sums required to be deposited for field and office work in the making of a survey of said tract; that in response to said application your petitioner was notified by the officer aforesaid, that the sum of one hundred and thirty-five ($135.00) dollars would be required for said purpose; that thereupon petitioner deposited said sum in the United States depository in San Francisco in accordance with section twenty-four hundred and one (2401) of the Revised Statutes, for which sum certificates
3 were duly issued; that said certificates were thereafter received by said marshal and *ex-officio* surveyor general, who caused a correct survey of said tract to be made in accordance with the regulations adopted by the Secretary of the Interior, the field notes, maps, and plats of this survey, which was known as survey number thirty-one (31), were duly returned to the proper office, approved by said marshal and *ex-officio* surveyor general, and certified copies of the same forwarded to the General Land Office; that thereupon your petitioner made said application for the purpose of purchasing said land under said statute.

4. That between the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, your petitioner made, upon said tract, improvements of the value of thirty-one thousand ($31,000) dollars in addition to those hereinbefore mentioned.

5. That on the third of March, in the year 1891, and up to and until the twenty-fourth of December, in the year 1892, the tract of land aforesaid had not been selected by the United States commissioner of fish and fisheries for the purpose of establishing fish culture stations.

6. That on the twenty-fourth of December, in the year 1892, the President of the United States, by virtue of said act of the third of March, in the year 1891, and other laws of the United States, issued a proclamation which declared, among other things, that the whole island of Afognak, including the property of your petitioner, was reserved for public purposes.

7. That, by the same proclamation, warning was expressly given to all persons, including your petitioner—

"Not to enter upon or occupy the tracts of land or waters reserved by this proclamation, or to fish in or to use any of the waters herein described or mentioned; and that all such persons or corporations now occupying said island or any of said premises, except under said treaty, to wit, the treaty of cession of the Russian possessions in North America to the United States concluded on the 30th of March in the year 1867, shall depart therefrom."

4 8. That at the date of said proclamation and reservation, your petitioner was and had been continuously from the times before mentioned, to wit, since the month of April, in the year 1889, in the actual and exclusive use, occupation and possession of

said tract of land and improvements; and that your petitioner did not occupy the same under or by virtue of the treaty mentioned in said proclamation, and accordingly, in obedience to the mandate of the Government, as expressed in the above-mentioned proclamation, departed therefrom.

9. That on or about the 15th of January, in the year 1895, the Commissioner of the General Land Office rejected and disapproved the aforesaid survey and application of your petitioner, because and on account of the reservation made as aforesaid.

10. That the act of the 17th of May, in the year 1894, was in the nature of a contract by the United States with your petitioner, that it should not be disturbed in its possession, and should be allowed to acquire title to said tract of land; that, relying upon said contract, your petitioner made improvements and built up and had upon said tract, on the third of March, in the year 1891, and the twenty-fourth of December, in the year 1892, an extensive and increasing trade and business; that on the dates aforesaid the trade and business of your petitioner was reasonably worth the sum of one hundred thousand ($100,000) dollars; that by reason of the breach of said contract by the United States, the trade and business aforesaid was entirely lost and ruined to your petitioner, whereby your petitioner suffered damage to the full extent of the value of the said business.

11. That your petitioner has never been paid for any of said improvements or for any portion of said damage by it sustained; nor has its deposit of four hundred and thirty-three ($433) dollars for the surveying of this tract, or any part thereof, ever been returned to it; wherefore and by reason of the aforesaid acts of the Government, the property of your petitioner has been taken by the United States for public purposes without just compensation, contrary to the provisions of the Constitution, the law of the land, and there is now justly due and owing to your petitioner, on account thereof the sum of one hundred and forty-four thousand three hundred and sixty-nine dollars and ninety-six cents ($144,369.96).

Wherefore your petitioner prays judgment against the United States of America for the sum of one hundred and forty-four thousand three hundred and sixty-nine dollars and ninety-six cents ($144,369.96).

RUSSIAN AMERICAN PACKING COMPANY (A CORPORATION),

[SEAL.] By S. F. WEEKS, *Secretary.*

WEBB, WEBB & LINDSLEY,
Attorneys for Claimant, National Union Building, No. 918 F St. N. W., Washington, D. C.

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the facts therein

stated upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

S. F. WEEKS.

Subscribed and sworn to before me this 31st day of March, A. D. 1897.

F. D. MONCKTON,
Commissioner U. S. Circuit Court, Northern District of California, & Clerk U. S. Circuit Court of Appeals, Ninth District.

6 II.—*Traverse. Filed April* [redacted] 1904.

In the Court of Claims of the United States, December Term, A. D. 1903.

THE RUSSIAN AMERICAN PACKING CO.
vs.
THE UNITED STATES. } No. 20758.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney General.

III.—*Argument and Submission.*

This cause was argued and submitted on the 26th day of April, 1904.

7 IV.—*Findings of Fact and Conclusions of Law. Filed May 16, 1904.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant herein, a corporation, was incorporated under the laws of the State of California in the year 1889, for the purpose of carrying on the business of packing salmon on the island of Afognak,

in the Territory of Alaska, and as such corporation in the spring of 1889 purchased and shipped to said island materials for the erection of a cannery and buildings for the purpose of canning salmon, and for that purpose, and without authority or license from the United States—other than whatever right it may have had under the act of May 17, 1884 (23 Stats. L., 24)—took possession of a site on said island containing about 159.52 acres of land, well covered with timber, from which the trees were cleared, and there was erected thereon a cannery, buildings, machinery, boats, and lighters for the purpose aforesaid, at a cost of $45,000, prior to which time no person or corporation had been in possession of said ground.

The claimant was, and had been continuously since taking possession of said ground for the purpose aforesaid, occupying and using the same, and was in possession thereof at the date of the passage of the act of March 3, 1891.

II.

On April 1, 1892, the claimant made application to the United States marshal and *ex officio* surveyor-general of Alaska for
8 the survey of said tract so entered upon under the provisions of said act of March 3, 1891, and in response to the notification of said officer deposited in the United States subtreasury at San Francisco, $433.80, said sum being the estimated cost of such survey. Thereupon said marshal and *ex officio* surveyor-general caused a survey of the ground so entered upon to be made, which he numbered 31, approved the same March 15, 1893, and forwarded to the Commissioner of the General Land Office for his action.

III.

After the passage of said act of March 3, 1891, and until December 24, 1892, the claimant continued to occupy said tract of land and to carry on its canning business and to keep its plant in repair. What improvements, if any, were made on said lands subsequent to the passage of the act of March 3, 1891, does not appear. Prior to December 24, 1892, the ground so used and occupied by the claimant had not been reserved by the United States for fish culture or any other purpose, nor had the same been purchased, entered, or applied for by any other person or corporation than the claimant. Said land was not mineral in character.

IV.

On December 24, 1892, the President of the United States issued a proclamation declaring the whole island of Afognak, including the site so entered upon, occupied, and improved by the claimant, reserved for the purpose of establishing thereon United States fish-culture stations, and warning all persons to depart therefrom. In July, 1893, the agents of the United States for protection of salmon

fisheries informed the agents of claimant on said island of said proclamation and ordered claimant company to depart therefrom, which it did, leaving its property thereon, and has not since returned thereto or used the same for the purposes of its business.

V.

On January 15, 1895, the Commissioner of the General Land Office, considering the survey so transmitted to him, as stated in finding II, addressed the following letter:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Jan.* 15, 1895.

To the U. S. marshal, *ex officio* surveyor-general, Sitka, Alaska.

SIR: With your letter dated March 15, 1893, was transmitted the plat of field notes of survey No. 31, executed by Albert Lascy, D. S., of a tract of land situated on Afognak bay, Afognak island, claimed by the Russian-American Packing Co., used for packing and cannery purposes.

The tract embraced in this survey is not in square form as required by statute.

The whole of Afognak island, its bays, rocks, and territorial waters, including the Sea Lion rocks and Sea Otter island, was made
9 a public reservation by the President's proclamation dated Dec. 24, 1892, which contains the following proviso:

"Provided that this proclamation shall not be so construed as to deprive any *bona fide* inhabitant of said island of any valid right he may possess under the treaty for the cession of the Russian possessions in North America to the United States concluded at Washington, on the 13th day of March, 1867."

Afognak island being a public reservation, and the lands embraced therein being exempted from disposal, survey No. 31 is therefore rejected, and you will notify the parties in interest of their right to appeal within 60 days.

Very respectfully, S. W. LAMOREUX,
Commissioner.

From which decision of the Commissioner no appeal was taken by the claimant.

VI.

Since the claimant company left said island it has employed a watchman to guard and watch its property, but notwithstanding such care and effort to preserve said property the same has deteriorated in value and is not worth more than one-fifth of its original cost. To what extent the property was deteriorated in value by use during the years 1889, 1890, 1891, and 1892 does not appear. Nor does it

appear that any effort was made by the claimant to sell or otherwise dispose of the improvements made by it on said lands or to remove the same therefrom, or that any objection to such removal was ever made by the defendants.

VII.

During the four years of claimant's occupation of said site on Afognak island, namely, in 1889, 1890, 1891, and 1892, it had built up a large business in the catching and canning of salmon, which business yielded a profit of $100,000 during said four years, of which about $35,000 was subsequent to the passage of the act of March 3, 1891. By reason of the claimant's removal from the site so entered upon by it pursuant to the President's proclamation and order as aforesaid, its business was totally destroyed. Said site so occupied was a valuable one for the purpose of salmon catching.

VIII.

The loss sustained by the claimant in having to remove from the land so entered upon by reason of the President's proclamation and order aforesaid was in excess of $3,000, exclusive of the sum of $433.80 so deposited by the claimant as set forth in finding II.

IX.

The claimant has never made application for the return of the money paid by it for such survey and has never received from the United States or from any other government or person any money or compensation whatever for the amount so deposited or for the loss of its property or injury to its business.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law:

1. That the claimant is not entitled to recover for the value of the improvements so erected by it on the land described in finding II, nor for the loss of profits arising from the claimant's removal from said land pursuant to the proclamation of the President.

2. The claimant is entitled to recover the sum of $433.80 deposited by it as set forth in finding II.

BY THE COURT.

10 V.—*Opinion of the Court.*

PEELLE, J., delivered the opinion of the court:

The claimant, a corporation organized under the laws of the State of California, brings this action to recover, on the theory of an im-

plied contract, damages alleged and found to have been caused to it by being dispossessed of certain lands and improvements thereon, on the island of Afognak, in the Territory of Alaska, by reason of the proclamation of the President of December 24, 1892, declaring said island of Afognak, including the land so claimed by the claimant, reserved for public purposes.

By the act of May 17, 1884 (23 Stats. L., 24), being an act to provide for "a civil government for Alaska," it was provided by the first proviso of section 8 "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Early in the spring of the year 1889 the claimant purchased and caused to be shipped to said island of Afognak materials for the erection of a canning establishment for the purpose of canning salmon, and for that purpose, and without authority or license from the United States, other than said act of 1884, took possession of a site on said island containing 159.52 acres of land, and after clearing away the trees thereon erected buildings for the purpose aforesaid at a cost of about $45,000.

Thereafter, and while the claimant was in the possession of said lands and improvements and engaged in the canning business as aforesaid, Congress passed the act of March 3, 1891 (26 Stat. L., 1095–1100), being "An act to repeal timber-culture laws, and for other purposes," sections 12 and 13 of which read:

"SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any incorporation incorporated under the laws of the United States or of any State or Territory in the United States now authorized by law to hold lands in the Territories *now or hereafter* in the possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: *Provided*, That in case more than one person, association, or corporation shall claim the same tract of land the person, association, or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association,
11 or corporation shall include improvements made by or in possession of another prior to the passage of this act.

"SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, *ex officio* surveyor general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, *ex officio* surveyor general; and on the receipt of such estimate from the United States marshal, *ex officio* surveyor general,

the said person, association, or corporation shall deposit the amount in the United States depository, as is required by section numbered 2401, Revised Statutes, relating to deposits for surveys.

"That on the receipt by the United States marshal, *ex officio* surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, *ex officio* surveyor-general; and the said United States marshal, *ex officio* surveyor-general, shall cause the said field notes and plats of such survey to be examined, and if correct approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

"That when said notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay said United States marshal, *ex officio* surveyor-general, for such land, and patent shall issue for the same."

On April 1, 1892, the claimant made application, as provided by said section 13, and Revised Statutes, section 2401, to the United States marshal and *ex officio* surveyor-general of Alaska for a survey of the tract so entered upon by it under the provisions of said act of March 3, 1891; and under the direction of said marshal deposited in the sub-treasury at San Francisco $433.80, being the estimated cost of such survey. Thereafter said marshal and *ex officio* surveyor-general caused the survey of the ground so entered upon to be made, which he numbered 31, approved the same and forwarded it to the Commissioner of the General Land Office. But before the Commissioner had acted thereon, the President issued a proclamation declaring the whole island of Afognak, including the site so entered upon by the claimant, reserved for fish-culture stations, and warning all persons to depart therefrom. Pursuant to that proclamation the agents of the United States notified the claimant's officers thereof and ordered them to depart, which they did, leaving the improvements they had erected thereon, which have since been cared for by a watchman, though the property, for want of use, had deteriorated and been materially reduced in value, but to what extent by use does not appear.

January 15, 1895, the Commissioner of the General Land Office, considering the survey so made and transmitted to him for his action, declined to approve the same, assigning as his reasons therefor that the tract embraced in the survey was not in square form as required by the act of 1891, and for the further reason that "the
12 whole of Afognak island, its bays, rocks, and territorial waters, including the Sea Lion rocks and Sea Otter island, was made a public reservation by the President's proclamation dated December 24, 1892." For the reasons stated the survey was rejected and

the marshal was directed to notify the parties in interest of their right to appeal within sixty days, but no appeal appears to have been taken by the claimant, nor does any application appear to have been made for the return of the money so deposited.

During the period of the claimant's occupancy and conduct of its business on the site in the years 1889, 1890, 1891, and 1892 a business was built up from which the claimant derived a large profit. By reason of having to remove from the lands the claimant has been greatly damaged. No improvements appear to have been made on said lands subsequent to March 3, 1891.

The claimant's contention is that by virtue of the act of 1884 a contract arose whereby the claimant was given permission to enter upon and occupy said lands, with the right to purchase the same from the Government upon terms to be thereafter fixed by Congress, and that having complied with the terms of the act of 1891 it thereby became entitled to have said lands surveyed and a patent issued vesting in it the title to said lands, and that on failure so to do and dispossessing the claimant the Government is bound to respond in damages as for a breach of such contract.

The defendant's contention is that the President had the authority at any time before the issuance of the patent to withdraw the lands from sale and to declare the same reserved for public purposes, and that therefore, as such patent had not issued to the claimant, the title to said lands never vested in it, without which the claimant could not have been divested of any right from which an implied contract could arise to pay it for the improvements so made on said land, or from any loss of profits arising from its business.

By the act of 1884 providing a civil government for Alaska, it was provided, in respect to those persons then in the *actual use or occupation* of any lands in said district or then claimed by them, that they should not be disturbed in their possession. Such possession had been acquired prior to the organization of such civil government, and maybe prior to the cession of Alaska to the United States. It was doubtless for these reasons that the provision was inserted in the act, but the terms under which such persons might acquire title to such lands were reserved to future legislation by the Congress.

When the claimant entered upon the lands and erected thereon buildings for the purpose of conducting its business, it did so without the authority or license of the United States—none being given by the act of 1884—and was therefore a trespasser. Therefore, as the claimant was not, when that act was passed, in the *actual use or occupation* of the lands here in controversy, and was *not then claiming* the same, the act of 1884 has no application to it and hence no rights can be claimed thereunder. We are, therefore, unable to concur in the construction given to that act by the district court of Alaska in the case of Young *v.* Goldsteen (97 Fed. Rep., 303), holding that the act applied to those persons going upon the land subsequent to the passage of the act.

But as the claimant was, in its own wrong, in the possession of the lands so entered upon when the act of March 3, 1891, was
13 passed, the remaining question is, What rights, if any, did the claimant acquire under that act from which a contract can be implied to compensate it for losses sustained by reason of its enforced removal from the lands?

The claimant being at the time of the passage of the act a corporation organized under the laws of California, was authorized to hold lands in the Territories, and being then in the possession of and occupying the lands in question for the purpose of trade or manufactures, was entitled to purchase not exceeding 160 acres, to be taken as near as practicable in a square form, of such lands at $2.50 an acre.

But was the claimant, as against the United States, entitled to have the survey approved by the Commissioner and a patent issued vesting in it the title to said lands after the President, in the exercise of his power, had issued his proclamation declaring the whole of the island upon which the land was situate reserved for public purposes? (Grissar *v.* McDowell, 6 Wall., 336; United States *v.* Payne, 8 Fed. Rep. 833–888, and Wolcott *v.* Des Moines Co., 5 Wall., 681.)

Although prior to the passage of the act of 1891 the claimant had without authority entered upon the land in question and erected thereon buildings and machinery, it was, by reason of its possession and occupancy, given the right to purchase not exceeding 160 acres of land, for the purpose of trade or manufactures, upon the terms and conditions stated in the act. Such right, however, was no greater than that given by the act to those who might thereafter, for the purpose stated, be in the possession or occupancy of such lands. In this respect, therefore, the act of 1891 differs from the act of 1884. By the act of 1891 the claimant's occupancy was recognized for the purpose of giving it the right to be preferred in the purchase of such lands if offered for sale; but as no patent was issued to the claimant the title to said lands never vested in it.

In the Yosemite Valley case (15 Wall., 77–87) it was held, following the case of Frisbie *v.* Whitney (9 Wall., 187–194), "that under the preëmption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to preëmption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper, and that the power of regulation and disposition conferred upon Congress by the Constitution only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with the settler for the first time acquires a vested interest in the premises occupied by him, of which he can not be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States.

Until such payment and entry the acts of Congress give to the settler only a privilege of preëmption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit
14 of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use."

The claimant contends, however, that inasmuch as it had erected valuable improvements upon the land in reliance upon its title and the good faith of the Government, and had paid the amount necessary to defray the expenses of the proceedings preliminary to making a final entry, that therefore the case comes more nearly within the rule announced in the case of Lytle *v.* State of Arkansas (9 How., 314–333), where it is said: "It is a well-established principle that where an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.' In this case the preëmption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for preëmption stands before us in a light not less favorable than it would if Cloyes or his representatives had been permitted by the land officers to do what in this respect was offered to be done."

But that case is quite different from the one before us. There the contest was between two claimants to lands open for sale. Here the contest is between the claimant and the Government respecting lands withdrawn from sale; and, having been withdrawn from sale, no right of preëmption could attach, unless the proclamation of the President reserving the lands for public purposes was in violation of law.

The claimant doubtless by what it did acquired as against all but the United States the right to purchase the land if open to sale, or as was said in the Yosemite Valley case, "Such claim, it must be remembered, is only a claim to be preferred in the purchase of lands of the United States in limited quantities, at fixed prices, when the lands are offered for sale in the usual manner. When one has acquired this claim by complying with the conditions of the law for its acquisition he has a legal right to be thus preferred when the

sale is made as against others asserting a similar right under the law which the court will enforce in proper cases. But the claim of preemption, as already said, can never arise when the law does not provide for a sale of the property. Until thus sanctioned by the law the claim, as stated by the court in that case (Lytle *v.* State of Arkansas), has no existence as a substantive right."

That the President had the authority by proclamation to withdraw the lands from sale and to set them apart for public purposes has been frequently decided, and therefore no neglect or fault can be attributed to him in the premises. In the case of Grissar *v.* McDowell (6 Wall., 363–381), in speaking of the authority of the President in this respect the court said:

"From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the preëmption act of May 29, 1830, it is provided that the right of preëmption contemplated by the act shall not 'extend to any land which is reserved from sale by act of Congress, or *by order of the President*, or which may have been appropriated for any purpose whatever.'" To the same effect also is the case of United States *v.* Payne (8 Fed. Rep., 883–888).

True the right to purchase not exceeding 160 acres of land was given to the claimant by the act of 1891 on the condition, among others, that it was in the possession of and occupying such lands for the purpose of trade or manufactures, but such right can not be construed as depriving the Government of its superior right to withdraw such lands from sale and to set them apart for public purposes prior to the issuance of a patent therefor. Hence any improvements made on such lands before they were withdrawn from sale and reserved for public purposes was at the risk of those seeking to purchase. But with respect to the money deposited with the proper agent of the Government, set forth in finding II, it is shown that the same was deposited on the faith of the act of 1891, and the Government having withdrawn the lands from sale and thereby denied to the claimant a patent vesting in it the title to such lands, the claimant is entitled, in lieu of the lands, to a return of the money so deposited, and for that amount judgment is ordered to be entered.

Weldon, J., did not sit in this case and took no part in the decision.

15 VI.—*Judgment of the Court.*

THE RUSSIAN AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

At a Court of Claims held in the city of Washington May 16th 1904 judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge and decree, that the said Russian American Packing Company, claimant, do have and recover of and from the United States the sum of four hundred and thirty three dollars and eighty cents ($433\frac{80}{100}$).

BY THE COURT.

16 VII.—*Application for and Allowance of Appeal.*

THE RUSSIAN-AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

Now comes the claimant, by its attorney of record, and makes application for, and gives notice of, an appeal to the Supreme Court of the United States from the judgment of this court rendered in the above-entitled cause, on the 16th day of May, 1904.

JOHN SIDNEY WEBB,
Attorney for Claimant.

BRITTON & GRAY, *Of Counsel.*

Filed August 5, 1904.

Order.

Let the above appeal be allowed.
August 6, 1904.

C. C. NOTT,
Chief Justice.

17 Court of Claims.

THE RUSSIAN-AMERICAN PACKING COMPANY
vs.
THE UNITED STATES. } No. 20758.

I, John Randolph assistant clerk of the Court of Claims hereby certify that the foregoing are true transcripts of the pleadings in

above-entitled cause, of the findings of fact and conclusions of law filed by the court, of the opinion of the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 11th day of August 1904.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,451. Court of Claims. Term No. 351. The Russian American Packing Company, appellant, *vs.* The United States. Filed August 22d, 1904. File No. 19,451.